

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

UNIBAR GLOBAL, LLC ^{1/}

Employer

and

Case 9-RC-17926

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 2100, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

The Employer is engaged in providing meter reading services to utilities in various states of the United States, including Louisville Gas and Electric from its facility in Louisville, Kentucky. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of all full-time and regular part-time meter readers employed by the Employer and working out of its Louisville, Kentucky facility, excluding all office/clerical employees, professional employees, and guards and supervisors, as defined in the Act. There is no history of collective bargaining affecting the employees involved in this proceeding.

A hearing was conducted in this matter on July 9, 2004 and the Employer and Petitioner filed timely briefs with me. The parties disagree with regard to the supervisory status of three "lead meter readers" and three "special meter readers," (the special meter readers are also referred to in the record as send back meter readers). The Employer, contrary to the Petitioner, contends that the individuals who hold these positions are supervisors because they possess and exercise one or more of the criteria set forth in Section 2(11) of the Act. I note that the Petitioner has expressed a willingness to proceed to an election in any unit found appropriate.

The record discloses that the Employer's claim that lead readers and send back readers are statutory supervisors is predicated on its assertion that they effectively recommend retention, termination, and discipline of employees. Additionally, the Employer apparently contends that through the lead readers and send back readers' participation in the evaluation process, they make effective recommendations regarding pay increases and promotions. It is not contended and the record does not reflect that lead readers or send back readers have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances. Thus, the issue to be

^{1/} The name of the Employer appears as amended at the hearing.

resolved is whether lead readers and send back readers effectively recommend retention, termination, discipline of employees, pay increases and promotions.

In view of the above considerations and the record in its entirety, I have carefully considered the evidence and the arguments presented by the parties on the issue. I have concluded, as discussed below, that the record fails to support the Employer's contention that the lead meter readers and send back meter readers are supervisors within the meaning of the Act. Accordingly, I shall include employees in those positions in the unit found appropriate. To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and reasoning that supports each of my conclusions on the issue.

I. OVERVIEW OF THE EMPLOYER'S OPERATIONS

The Employer is a contractor for Louisville Gas and Electric (LG & E) providing meter reading services in the greater Louisville, Kentucky metropolitan area. The Employer also performs meter reading services for utilities in Washington D.C., Arkansas, Louisiana, Maryland, Michigan and Texas. The Employer currently employs about 40 meter readers to perform the primary function of reading meters on a daily basis. In addition to the 40 meter readers the Employer employs 3 employees who hold the title of lead readers and 3 additional employees who hold the title of send back readers.

The contract manager, Ken Kline is in charge of the day-to-day operations of the Louisville, Kentucky operation. Robert Mercke is the Employer's safety manager, and Don Reddington is the assistant contract manager. Kline apparently reports to Vice-President of Meter Reading Operations Dennis Millard. Millard is based out of Ann Arbor, Michigan. The Human Resources Manager Sonjia Carpenter is based in Ann Arbor, Michigan where the Employer's Human Resources Department is located. The Employer's lead readers are: Debbie Ater, Melvin Trusty and Barry True.^{2/} Its send back readers are Maurice Hardin, Christopher Lee, and Ray Kline. All of these individuals were retained from the prior contractor with LG & E for meter reading services. However, Hardin was employed by the former contractor as a lead reader rather than as a send back reader.

All of the employees involved here, the production meter readers, lead readers, and send back readers, read meters that have a set of four dials with numbers zero through nine for gas. Electric meters are similar but have five dials. Additionally, all of the employees involved here utilize a hand-held computer known as an "Itron" for the performance of their jobs.

Each meter reader is assigned a specific route to read consisting of hundreds of meters, which is contained in his or her respective Itron. Meter readers input meter usage data that they collect into their hand held Itrons. The Itrons are linked by a wireless network to a mainframe

^{2/} The record reflects that Trusty was in the hearing room during the course of the proceedings and was available to be called by either party. However, neither party called him to testify. As noted below, the burden of proving supervisory status lies on the party asserting the existence of such status. In this case that party is the Employer, which elected not to call Trusty in support of its contentions.

database operated by LG & E that assimilates all of the data to generate a customer billing record. Meter readers input into the Itron actual readings and explanations for “non-reads” of meters. “Non-reads” occur when, for a variety of reasons, there are meters that cannot be read. For example, meters may be inaccessible because they are located inside the structure, they are behind a fence and gate, or dogs are near the meter. The lead readers and send back readers also use the Itron devices in the performance of their job duties including initial meter reading, quality assurance and monitoring functions.

The lead readers and send back readers are hourly paid employees. The lead readers who work for the Employer out of its Louisville facility are paid in a range of \$12.75 to \$14 an hour and the send back readers are paid in a range of \$10 to \$11 an hour. Meter readers are paid between \$9 and \$12 an hour. All of the employees in the proposed unit are entitled to the same benefits and all are subject to the same rules contained in the employee handbook, whereas admitted supervisory personnel are not. Lead readers are experienced personnel and do not receive specialized training in lead functions, other than in lead only meetings in which they are instructed in the performance of field audits. There is no evidence that such meetings or instructions has occurred at the Louisville operation during the Employer’s tenure.

Lead Readers

The lead readers received written offers of employment from the Employer dated May 13, 2004 after it received the meter reading contract for LG & E. All were advised that the offer was for a lead reader position and specified their respective pay rates, between \$12.75 and \$14 an hour. The letter did not specify the nature of the duties that they would perform with the Employer. The letter references a “mandatory in-processing” meeting for May 24, 2004. There is no evidence that any specific duties of lead or send back readers were discussed in this meeting. Thus, at the time of the hearing in this matter, lead readers have performed duties similar to regular meter readers. The Employer asserts, and the testimony discloses, however, that lead readers have been performing regular “production” work in lieu of other duties as a result of short staffing. It is not clear when or the extent to which lead readers will resume the type of duties that employees in those positions performed under Terasen, the former contractor that performed meter reading services for LG & E. In this regard, the record reflects that Terasen’s lead readers did not perform a substantial amount of “production” work.

Audits, Time Sheets, Training, Evaluations and Discipline

Audits

When employed by Terasen and at other locations, lead readers performed monthly field audits of meter readers’ work. They accomplished these audits by following behind the meter readers as they performed their route duties and “sampling” a portion of their routes for accuracy. In performing these audit functions, they see that meter readers are “in uniform” and are wearing boots rather than tennis shoes. They also ensure that certain meters are reset and resealed as needed. Lead meter readers have their own cubicles in the LG & E facility. Managers Kline, Mercke, and Reddington have their own offices in the same facility. Lead readers have cubicles because they are required to perform certain computer work in connection

with their job duties. For example, they often retake readings performed by a meter reader a day after they have been entered into the system. Under these circumstances, they must manually input any corrections to the initial readings. Additionally, one of the lead readers, Barry True, maintains a computerized spreadsheet that tracks regular maintenance requirements for the Employer's vehicles.

Field audits are designed to ensure accurate meter reading and they may indicate different problems leading to inaccurate readings. Some of these problems are equipment related, some may be from human error, and some the result of intentional misconduct on the part of meter readers. Regarding the latter category, as an example, lead readers and send back readers are both called upon to ascertain whether a meter reader has engaged in "curbstoning." Curbstoning, also referred to as curbing, is the fraudulent practice of reading a meter from the curb or failing to get close enough to the meter to make an accurate reading. In such instances the data that is entered by a meter reader in to his or her Itron is fictional and often grossly inaccurate. Curbstoning might come to the attention of a lead reader while performing a field audit by reading behind a meter reader. This practice might come to the attention of a send back reader when computerized data and a review of the meter tends to indicate the presence of bad data that is unlikely to be the result of equipment malfunction or of a simple misread.

Time Sheets

When employed by Terasen, lead readers initialed employee time sheets Monday through Thursday. The record does not disclose why lead readers initialed the sheets. On Fridays admitted supervisory personnel signed off on these same time sheets. Currently, time sheets are initialed or approved on a daily basis by admitted supervisory personnel of the Employer.

Training

Lead readers play a role in training new meter readers. The record discloses that the Employer utilizes lead readers to accompany and train new readers. Lead readers' training duties include explaining to new readers how to locate meters, how to interact with customers if the meter reader has to enter their premises, how to use the Itron, and how to utilize time sheets. Vice-President Millard testified generally regarding the Employer's experience at its other locations with lead readers' participation in the training process. According to Millard, lead readers are obligated to advise management on the suitability of new readers for the job. A report to management of unsuitability for the meter reader position from a lead reader may result in the termination of that employee during his or her probationary period. I note, however, that this testimony was generalized and lacking in specific examples. Further, there is no evidence that the lead readers have been told that they have this authority. According to Millard, lead readers in Louisville are under the same obligation to report on the progress of probationary readers and even to make recommendations as to whether those employees should be retained. Again, no specific examples were provided of such conduct having occurred during the time that the Employer has had the LG & E contract in Louisville. In addition, there is no evidence that the lead readers in Louisville have been told that they have this authority.

The Employer also uses other experienced meter readers to perform these training tasks, but prefers to use lead readers when they are available. In this regard, Contract Manager Kline testified that it is a “fairly standard” operating procedure for regular, and presumably experienced, meter readers to train new readers or trainees. Under Terasen, regular meter readers performed most of the training functions. In fact, Terasen apparently designated one or two regular meter readers to perform most of the training. The record reflects that meter readers under Terasen as well as the Employer are routinely asked how new readers are performing and the meter readers inform the Employer as to whether the new readers need more work or are performing adequately. In the examples provided in the record, the regular meter readers who perform this function are not asked to make recommendations regarding the continued employment of employees that they train.

Evaluations

As indicated above, lead readers for the Employer at its other locations have played a role in evaluating meter readers. The record discloses that the Employer has a 90-day evaluation period during which time meter readers are considered probationary. Lead readers do not complete written evaluations for meter readers or probationary meter readers, nor do they make direct recommendations as to pay raises or the future employment status of meter readers or probationary meter readers. Rather, through field audit reports, lead readers advise the Employer of the extent to which each new meter reader reviewed is performing his or her “production” tasks. Under the Employer’s policy, these field audits, also referred to as spot checks, are to take place once a month for each meter reader, including the experienced readers. However, as a result of understaffing, field audits have not been performed at the Louisville location since the inception of the Employer’s operation.

The record discloses that under Terasen, lead readers who performed regular field audits or specifically requested spot checks on meter readers did not make recommendations regarding a meter reader’s continued employment. Rather, the record discloses that lead readers simply reported what they observed. For example, former lead reader and current send back reader Maurice Hardin testified that he was assigned to check on a particular meter reader’s performance. Hardin reported that the meter reader was making a large number of misreads, apparently because he was also working a night job and was sleep deprived. Hardin reported this information to Kline, but he did not make any recommendations.

Recommending Discipline

Vice-President Millard testified that the Employer’s contract managers and assistant managers primarily operate in an office environment and that they depend on feedback from lead readers and send back readers regarding the quality of work performed by meter readers in the field for purposes of making discipline and discharge decisions regarding the meter readers. Once again, however, his testimony is generalized and does not yet apply to circumstances as they currently exist at the Employer’s Louisville operations. The Employer utilizes lead readers to perform field audits as discussed above, to investigate customer complaints, and to investigate meter reading anomalies. The job of the lead reader in performing such work is to report to the Employer’s managers and supervisors on the results of any audit or investigation. Lead readers

have not yet played this role in the performance of their duties for the Employer at the Louisville location. The Employer contends that they will do so once the staffing level of meter readers has been increased sufficiently to enable it to relieve lead readers of most production related duties.

Lead readers under Terasen played a limited role in recommending whether meter readers should be disciplined or terminated. In this regard, the record contains some examples of lead readers being involved in the disciplinary process. Thus, lead reader Debbie Ater advised Contract Manager Kline on one occasion that a new reader told her that he was going to “hang out” on a route rather than connect with the meter reader with whom he had been paired. Kline stated that it was decided that the reader would be discharged the next day, but that he called in and resigned before he could be discharged. It is not clear whether Ater gave Kline a recommendation regarding whether this employee should be retained. In response to a question as to whether Ater made a recommendation, Kline testified that, “Well, we basically compared stories based on what the, the Reader told us . . . and . . . when her story didn’t match up to what the . . . new employee told the Reader then . . . based on her judgment we decided that we were going to terminate the employee.”

On another occasion, Kline used Ater to investigate a meter reader whom he suspected of curbing and falsifying “non-reads.” Kline and Assistant Contract Manager Reddington switched this meter reader to another route. They had another meter reader perform his route, uncovering a number of errors that the meter reader under suspicion had committed the prior month. At the same time, the meter reader under suspicion was assigned a route with a low number of “non-reads” and he reported a much higher number of “non-reads.” Kline had Ater audit the route the following day. Following her audit, Ater reported to Kline that many of the reported reasons or barriers for “non-reads,” such as bees, wasps, bushes and gates were untrue and did not exist. However, there is no evidence that she made any type of recommendation in connection with her findings.

Kline also testified the lead reader Melvin Trusty had been involved in the disciplinary process by making recommendations regarding meter readers with questionable meter reading records. Thus, Kline assigned Trusty on several occasions to “walk with” readers experiencing problems and to provide Kline with feedback regarding the meter reader’s suitability for the position. A specific example of Trusty’s involvement in evaluating meter readers, while employed by Terasen, involved his investigation of a meter reader for allegedly engaging in curbing. Kline testified that Trusty made a recommendation concerning his belief as to whether there was sufficient evidence to terminate the meter reader for the suspected offense. Kline elected against discharging the meter reader for lack of definitive proof. However, the record does not disclose what, if any, specific recommendation Trusty made regarding the discipline to impose. Lead reader Ater was involved in a similar investigation into a “curbing” allegation while employed by Terasen in about February 2004. Likewise, this meter reader was not discharged because of a lack of evidence. Although Kline testified generally that Ater makes recommendations in such situations as to whether the particular meter reader should be discharged, the record does not show what recommendation, if any, she made in this particular instance.

Kline provided more specific information regarding the involvement of lead readers in a situation where a meter reader drove through a customer's field following several days of rain to read a meter rather than walking to the meter. The meter reader's conduct caused some damage to the customer's property and to a shovel that he ran over. Lead readers Barry True and Melvin Trusty visited the scene following the customer's complaint and reported back to Kline. Kline asked them how bad they thought the damage had been and asked them how long they thought that Terasen should suspend the meter reader. According to Kline, True and Trusty both recommended that the meter reader involved in the incident be suspended for 3 days. Kline determined that a 2-day suspension was warranted.

Kline testified that while employed by Terasen he generally followed the recommendations of lead readers when they told him that they did not believe disciplinary action was appropriate. However, he testified that he did not follow their recommendations regarding discipline in some instances. Thus, in several instances regarding "curbing" incidents, lead readers apparently recommended disciplinary action. Kline or Assistant Contract Manager Don Reddington determined on those occasions that more investigation was needed prior to the issuance of any disciplinary action and the lead readers' recommendations were not followed. In this regard, Kline testified that either he or Reddington determine when more investigation of a situation is needed.

Former lead reader Hardin testified that he did not make disciplinary recommendations regarding meter readers or any recommendations regarding their performance in the field. Rather, according to Hardin, he merely reported to Terasen managers what he observed in the field. In this regard, Hardin states that he was never asked by Terasen's managers to make a recommendation. However, Hardin testified that he was reluctant to tell Kline that a meter reader was not going to make it in the position because he feared that such information could result in the meter reader's termination.

Send Back Readers

Send back readers spend the bulk of their time performing readings on individual meters for which an irregular pattern has been detected by the Employer's computerized customer accounting system or for which no readings were taken. In the latter situation the non-reads are referred to as "skips." The computerized system automatically kicks out readings that exceed certain specified parameters. Thus, substantial usage increases, decreases, and non-usage readings will be separated out for the send back readers to investigate. The send back readers then investigate the reason(s) that the reading for a particular meter varied from the specified parameters.

Unlike lead readers, who apparently did not have regularly assigned routes under Terasen, send back readers are assigned to regular meter reading routes. However, their send back duties still occupied a majority of their work time. Under the Employer, the send back readers continue to perform send back work the majority of their work time. Send back readers share several cubicles in the LG & E facility. Following an investigation, send back readers turn their information into Safety Manager Mercke, who does not inquire about specific send backs and the identity of the meter reader involved. Rather, Mercke is concerned with completing a

certain number of send backs each day and requests that the send back readers inform him as to how many they completed.

The record evidence regarding the participation of send back readers in the disciplinary and evaluation process is much more limited than the record that was developed with respect to the lead readers. In fact, Kline merely described his reliance on the send back leaders for purposes of meting out discipline to meter readers as similar to his reliance on the lead readers, but “to a lesser extent.” In this regard, when send back readers take another reading of meters for which no reading was provided or that have been determined to exceed established parameters, they may provide Kline with an opinion as to whether the send backs were generated by false readings or simple error. In the cited example, a large number of send backs on a particular route, such that a pattern might be established, could result in the emanation of such an opinion. However, other than the incident described below, specific examples are lacking.

One example of a send back reader being tangentially involved in the disciplinary process was provided. Shortly before the Employer took over the operation from Terasen, send back reader Christopher Lee was directed to investigate a meter reader whose Itron data was generating a large number of send backs. It was discovered that this particular meter reader was “curbing” because the re-read of the meters did not comport with the data that he was inputting and it became apparent that he was merely adding a certain number, the same number, to the prior reading for each gas and electric meter for which he was “curbing.” There is no evidence whether Lee made any kind of recommendation or whether he merely reported his findings. This type of investigation involving mass send backs for a single meter reader might typically have been the province of a lead reader except that they were unavailable to perform such functions during the waning days of Terasen’s tenure, as a result of a loss of manpower prior to the transition to the Employer’s operation of the service.

II. THE LAW AND ITS APPLICATION

Before analyzing the specific duties and authority of the lead readers and send back readers, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only 1 of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory

authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp.*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 949 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the lead readers and send back readers possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 NLRB 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard the Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

The burden of proving supervisory status lies with the party asserting that such status exists. *Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I observe that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that the supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer asserts that the lead readers and send back readers possess certain indicia of statutory supervisors. Specifically, as I have previously noted, the Employer contends that the lead readers and send back readers make effective recommendations regarding retention,

termination, and discipline of employees, and through their role in the evaluation process, make effective recommendations regarding pay increases and promotions.^{3/} With regard to the effective recommendation of discipline I note that it is “well settled that the mere exercise of a reporting function which does not automatically lead to further discipline or adverse action against an employee does not establish disciplinary authority.” *Lincoln Park Nursing Home*, 318 NLRB 1160, 1162 (1995); see also, *Lakeview Health Center*, 308 NLRB 75, 78-79 (1992) and cases cited therein; *Ken-Crest Services*, 335 NLRB 777, 778 (2001). In considering the role of the lead readers and send back readers in evaluating employees, a criterion not itself set forth in Section 2(11), I note it is equally well settled that the ability to evaluate employees, without more, is insufficient to establish statutory supervisory authority. *The Mount Sinai Hospital*, 325 NLRB 1136 (1998); *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988); *Passavant Health Care Center*, 284 NLRB 887, 890 (1987). In considering the Employer’s contentions that the send back readers and lead readers are statutory supervisors, I will separate the two classifications of employees for analysis.

Send Back Readers

With respect to the send back readers the record lacks probative evidence that they are supervisors within the meaning of the Act. To the contrary, it is clear that they perform a function akin to that of quality control employees. In this regard, they review readings for individual meters lacking proper reads or exceeding established programmed parameters as set by the Employer’s customer LG & E. The send back readers then report the results of these “send back” readings to personnel whose supervisory status is uncontested. It appears that in many instances, the Employer’s managers do not attempt to ascertain the identity of the meter reader for whom the send back was generated by LG & E’s computer system. Rather, their focus is on “clearing” as many send backs as possible and making corrections or adjustments to the meter readings. The Employer merely offers, without further elaboration, that the send back readers perform “essentially the same supervisory functions” as do the lead readers.

Based on the above and the record in its entirety, the Employer has failed to meet its burden of establishing by the preponderance of the evidence that the send back readers are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will include all employees employed in the classification of send back reader in the bargaining unit found appropriate.

Lead Meter Readers

I turn now to an examination of the status of the lead readers. Although a slightly closer case regarding supervisory status is presented, I once again find that the Employer has failed to carry its burden of establishing that the lead readers are supervisors within the meaning of the Act. In analyzing this issue, I note that the Employer has failed to clear several hurdles that belie its contentions. Thus, the Employer’s evidence that lead readers perform functions that are

^{3/} The Employer also asserts that lead readers suggest changes to (transfers of) meter readers’ routes and that they recommend meter readers for promotions. There is no specific or probative record evidence that this occurs and the only evidence that arguably supports these claims was elicited through leading questions and is generalized. Moreover, there is no evidence that such recommendations, if made, are followed by the Employer.

supervisory in nature is predicated on the tasks that employees in the lead reader position historically performed in Louisville for Terasen and not the tasks that lead readers have performed to date for the Employer in its Louisville operation. I do note that the Employer asserts that because of understaffing, lead readers in Louisville have primarily, if not exclusively, performed initial meter reading for the Employer from the inception of its operation in Louisville and have not been conducting field audits as they did when employed by Terasen. Further, the Employer contends that the lead readers will, at some point resume, the duties they performed with Terasen. However, the record reflects that the timing for the resumption of these duties is uncertain.

Aside from the fact that the lead readers are not performing the duties that the Employer is principally relying on for the premise that they are statutory supervisors, I note that the record does not establish that lead readers, as they functioned under Terasen, exercised independent judgment in connection with any recommendations that they made or that their recommendations were effective. Regarding recommendations, the record discloses that on one occasion lead readers were solicited to make a recommendation as to the appropriate penalty for a meter reader who damaged a customer's real and personal property by driving across the customer's land to read a meter. The lead readers suggested a 3-day suspension, but Kline opted for a 2-day suspension for the offending meter reader. No explanation was offered for why Kline did not follow the lead readers' recommendation.

On other occasions described in detail above, lead readers recommended meter readers be discharged for "curbing." However, the Employer, through Kline, determined that there was insufficient evidence to support a discharge decision and did not follow their suggestions. The record does not reflect how Kline made his determination that the evidence was insufficient. In at least one other example reflected in the record of a lead reader allegedly recommending the discipline of an employee, there is no evidence that the lead reader made any type of recommendation. Rather, she merely reported the facts that she had gathered. In sum, even if the lead readers for the Employer will eventually perform the same duties as they did under Terasen, the record evidence falls short of establishing that they engage in effective recommendation of disciplinary action, including effectively recommending discharge.

There is also a lack of probative evidence that the lead readers exercise any supervisory indicia based on their purported participation in the evaluation process for probationary employees. The generalized testimony in this area reflects only that new or probationary employees are sometimes trained by lead readers and that they may provide their opinion regarding the length of time, if ever, it will take a probationary employee to become an adequate performer. The Employer, presumably through Kline, then determines whether the probationary employee will be retained. Indeed, I note that the "recommendations" made by lead readers under Terasen frequently consisted of simply reporting what they had learned through field audits, spot checks, or targeted investigations directed by the Employer. No independent judgment is required to engage in a purely reportorial function. Finally, there is no probative testimony that the lead readers possess or exercise supervisory authority in the evaluation of employees that could result in their receiving a pay increase or promotion.

Based on the above and the record as a whole, I found that the lead readers are not supervisors within the meaning of Section 2(11) of the Act. In reaching this decision, I have carefully considered the arguments made by the Employer in its brief and find that they are not persuasive. Specifically, I note that the Employer has not cited any precedent which supports its argument that the lead readers are statutory supervisors. Accordingly, I will include them in the unit found appropriate.

III. EXCLUSIONS FROM THE UNIT

The parties agree, and the record shows, and I find that the following persons are supervisors within the meaning of the Act: Dennis Millard, vice-president of meter reading operations; Sonjia Carpenter, human resources manager; Ken Kline, contract manager; Robert Mercke, safety manager; and Don Reddington, assistant contract manager. Accordingly, I will exclude them from the unit.

IV. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time meter readers, including lead readers and send back readers, employed by the Employer and working out of its Louisville, Kentucky facility, excluding all office/clerical employees, and all professional employees, guards and supervisors, as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Brotherhood of Electrical Workers, Local Union 2100, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **August 2, 2004**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect

the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **August 9, 2004**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 26th day of July 2004.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

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